In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 102.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,
Plaintiff in Error,

AGAINST

STATE OF MINNESOTA on the relation of JAMES N. MARR,
Defendant in Error.

Replying Brief for Plaintiff in Error on Behalf of St. Paul and Duluth Railroad Company.

The briefs already filed on behalf of the plaintiff in error sufficiently meet, we trust, the propositions and authorities found in the brief on behalf of the defendant in error.

A few of the authorities cited by defendant in error may, however, call for some words of consideration.

I.

Under Point II., page 25, of the brief of the defendant in error, the case of State vs. Pioneer Savings & Loan Co., 63 Minn., 80, is cited. Examination of this

case will show that it is a conclusive authority on the proposition that the Act of March 3, 1865, in providing for a system of taxing the gross earnings of the St. Paul and Duluth Railroad, as the representative of its property, was constitutional, and that the provisions of the Constitution of the State of Minnesota relative to equality and uniformity of cash valuation and the taxation of all property, real and personal, except certain specified exemptions, were satisfied by a statute which taxes the representative of property, without providing for assessing the property itself. The case in question involved a statute of the State of Minnesota, providing for the taxation of stock of savings and loan companies, and the exemption of the personal property of such corporations. The Court held that the law was unconstitutional, because it made no provision for the taxation of property of non-residents upon which the corporation had made loans.

The Court says:

> "It is true, as claimed by counsel for defendant, that a law providing for the taxation of property is not unconstitutional, because in its practical operation property which ought to pay taxes escapes the burden. But such is not the case. It is conceded, both by the defendant and State, that Section 34, by necessary implication, exempts from taxation the personal property of the defendant and similar associations. Such being the case, it is unconstitutional, unless the Legislature has provided for the taxation of the representative of the property, the stock."

II.

Under Point IV., at page 30 of the brief of the defendant in error, three cases in this Court are cited, which are claimed to show that this Court has become committed to the doctrine that, "under provisions like those of the Minnesota Constitution, contracts stipulating away the power of taxation cannot be made." We submit that these cases do not commit this Court to any such proposition.

The first case cited is that of *Welch vs. Cook*, 97 U. S., 541, which involved a statute enacted by the Legislative Assembly of the District of Columbia in 1873. That statute provided in substance that all property thereafter employed within the District for manufacturing purposes in excess of five thousand dollars should be exempt from all general taxation for a period of ten years from the date of the act. The Legislative Assembly of the District of Columbia was abolished by Act of Congress in 1874, and it was provided that there should be levied on all real estate in the District, except that belonging to the United States and the District itself, and that used for educational purposes, certain taxes. It was held by this Court, following the case of *Salt Company vs. East Saginaw*, 13 Wall., 373, that the Act of 1873 did not constitute a contract between the District and persons engaged in the manufacturing business in the District.

This Court in the case of *Salt Company vs. East Saginaw*, 13 Wall., 373, in an opinion by Mr. Justice BRADLEY, very clearly points out the distinction between a general bounty law and a special contract with particular individuals or corporations. In that case a law had been passed by the Legislature of Michigan providing that all companies or corporations formed for the purpose of manufacturing salt and all individuals engaged in such manufacture shall be entitled to have all property used for that purpose exempt from

taxation for any purpose and shall be entitled to receive as a bounty the sum of ten cents for every bushel of salt manufactured from water obtained by boring in this State, in excess of five thousand bushels. The Court held this did not constitute a contract; but the Court say:

> "It is unnecessary at this time to discuss the question of power on the part of a State Legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this Court."

The Court, however, held that general encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties, drawbacks or other advantage, are always under the legislative control, and may at any time be discontinued; such a law being nothing but a bounty law, and in its nature a general law, regulative of the internal economy of the State, dependent for its continuance upon the dictates of public policy and the voluntary good faith of the Legislature.

The Court say:

> "Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract, but the case before us is not of that kind. * * * The case differs entirely from those laws and charters which have been adjudged to be irrevocable contracts. Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the State, and

corresponding duties and obligations are assumed by the corporation, and, if no right to alter or repeal is reserved, stipulations as to taxation or as to any other matter within the power of the Legislature are binding on both parties."

Counsel for defendant in error in effect concede, on page 31, that neither the case of *Welch vs. Cook*, nor the case of *Salt Company vs. East Saginaw* "is similar to the case at bar." They claim, however, that the case of *Welch vs. Cook* is "instructive," because of the "striking similarity" between the language of the repealing Act of Congress and the language of Section 3 of the Constitution of Minnesota. We confess ourselves unable to perceive the alleged "striking similarity." The Act of Congress referred to was in the ordinary form of a taxing act and explicitly provided for the levy of a tax "on all real estate in said District," except that belonging to the Federal or District Government and that used for educational purposes. There was no room for doubt or discussion that this language operated to require a tax to be levied upon property in the district used for manufacturing purposes. The only question was whether the previous act constituted a contract which should prevail, notwithstanding the general language of this new tax law. The Court held that it did not. The language quoted by counsel for the defendant in error, on page 32, to the effect that the Court will "presume" that Congress knew the state of the law at the time of the passage of the Act of 1874, and that it knew of the existing exceptions to taxation in the District, and that it intended to make the new act stand in place of all others upon the subject, does not seem to us to throw any light upon the controversy in the case at bar. We are quite willing to concede that the framers of the Constitution of Minnesota must be presumed to know the condition of the then existing laws in the Territory of Minnesota, and we are also

quite willing to concede that the Constitution of the State stands as the "supreme and exclusive rule" upon that subject as well as every other subject as to which it operates. We have pointed out at great length and in detail upon our main brief the construction placed upon the Constitution by those who framed it and their immediate successors, a construction expressly or impliedly approved of and acquiesced in for a period of forty years. We shall not repeat the argument upon this branch of the case. Our only object at present is to controvert the proposition announced by counsel for the defendant in error that this Court has laid down any such doctrine as stated in Point IV. of the brief of defendant in error.

The second case cited by counsel for defendant in error as sustaining the proposition contended for, is *Railroad Companies vs. Gaines*, 97 U. S., 697. In that case this Court expressly declined to construe the Constitution of Tennessee, on the ground that the Supreme Court of the State had construed the Constitution and such construction would be followed by this Court. It was held that the Constitution of Tennessee, adopted in 1870, had been authoritatively construed by the Courts of Tennessee in other cases, and those courts "in so doing have established a rule of decision for us." The statute in question was passed in 1875. The Supreme Court of Tennessee in 1877 in another case between other parties held the act to be unconstitutional. This ruling of the Supreme Court of Tennessee was made within a few years after the adoption of the Constitution and within two years after the passage of the act which was held to be unconstitutional and in a case between parties other than those involved in the controversy in this Court. Under these circumstances this Court declined to overrule the construction placed upon the Constitution by the Supreme Court of the State. This is quite a different situation from the case at bar, where the construction of the Constitution is made by the Supreme Court of

Minnesota for the first time in the very case at bar and forty years after the adoption of the Constitution and thirty-three years after the acts of the Legislature had been accepted and acted upon by the St. Paul and Duluth Railroad Company or its predecessors. As already stated, this Court did not itself construe the Constitution of Tennessee in the case of *Railroad Companies against Gaines*, nor express any approval or disapproval of the decision of the Supreme Court of Tennessee, except to the extent of intimating that it was not clearly wrong. The decision is, therefore, not an authority to the effect that contracts stipulating away the power of taxation cannot be made.

The third case cited by counsel for defendant in error at page 30 is *Huntington vs. Worthen*, 120 U. S., 97. This case involved the construction of the Constitution of Arkansas. That Constitution, however, was so plain that there would seem to be no room whatever for construction.

It expressly provides that "all laws exempting property from taxation other than as provided" therein "*shall be void.*" Counsel for defendant in error say:

> "Such words are accumulative and precautionary, and do not, it would seem, add to the legal effect of what precedes."

The fact that the framers of the Constitution of Arkansas in 1874, with the experience before them of all the other States up to that time, should have deemed it necessary to put this language in their Constitution, would indicate that such language was deemed to be something more than merely "accumulative and precautionary," and that it did add something to the effect of the language preceding these words; at any rate, their use left "no room for doubt," while the language of the Constitution of Minnesota certainly does leave "room for doubt." The carrying out to its logical conclusion of such an explicit provision of the Constitution of Arkansas certainly does

not commit this Court to the doctrine that, under the provisions of the Minnesota Constitution, such acts as those under which we claim the right to commuted taxation are invalid.

III.

The proposition announced in Point VIII. of defendant in error's brief proceeds upon a misapprehension of the position we have taken with regard to the taxability of the railroad land grants.

We do not contend that the State is precluded from exercising its taxing power after the railroad has acquired title under the land grants. What we contend for is that while the State held the lands they were non-taxable, and that when granted by the State to the railroad companies they might be granted free from taxation in the same manner as when held by the State, and that this would be a lawful exercise of the right of the State to make donations for public purposes. In other words, our argument on this branch of the case is as follows :

A railroad company is a corporation organized for a public purpose. This has always been recognized by the Courts. Being organized for a public purpose the State has the right to confer upon the corporation the right of eminent domain. It also has the right to make donations of public property in aid of a railroad. It also has the right in making such donations of public property to couple with the donations immunity, entire or partial, from taxation upon such property. The property in question in this suit came from the United States to the State clothed with a trust, and for the purpose of being used to aid in the construction of railroads in the State.

The Legislature in donating the lands and in carrying out the purposes for which the United States had granted the lands to the State could lawfully and properly reserve these lands from taxation while owned by the railroad company in whose aid they were granted.

In this connection, however, we again call the attention of this Court to the fact that we do not claim exemption from taxation, but a commuted form of taxation. The right, however, of the State to grant absolute immunity from taxation as to these lands, we do insist upon for the reasons above stated.

Counsel for defendant in error lay great stress on this branch of the case upon *Tucker vs. Ferguson*, 22 Wall., 528. In that case it was held that the State might tax lands granted by the United States to the State for railroad puposes and granted by the State to a railroad company.

As already stated, we do not dispute this proposition; all that we claim is that as the State held the lands in trust for a particular purpose it might, in granting them for that purpose, rightfully and properly grant them free from taxation as an additional element of the granting.

It appeared in the *Tucker* case that the State in the act accepting the grant in 1857, agreed *sua sponte* to forbear to tax for seven years. The legality of this agreement was not disputed, but was, in effect, conceded, and this Court say:

> "There is no complaint that this stipulation has "been violated" (p. 573).

Section 20 of the act provided for an annual tax of one per cent. upon the cost of the road and its equipment and appurtenances in lieu of all other taxes. It was held by this Court that this did not apply to the land grants, as they were covered by the previous section of the act which was by its terms limited to seven yeers (p. 573).

By an act passed in 1871 the lands were exempted from local taxation for three years. This was held not to be a contract, there being no consideration; the company being required to do nothing and having done nothing in return for the exemption—the grant having been made and accepted fourteen years before. It was further held that the question of the constitutional power of the Legislature to levy taxes other than specific taxes did not arise in that case (p. 575).

We fail, therefore, to see that this decision either "fully and completely" disposes of the question involved in this case, or that it in any way impairs the force of the propositions for which we are contending in this court.

As to the so-called "swamp lands" it is quite true that this Court has held, in *United States vs. Louisiana*, 127 U. S., 182, and other cases, that the power of the State to dispose of such lands rests wholly in the discretion of the State, and that the appropriation of the proceeds of the sale of the lands rests in the good faith of the State, and that neither a contract nor a trust "*following the lands*" was created. These holdings, however, do not impair the proposition that these lands were granted to the State for public purposes, and that the proceeds are to be used for public purposes; nor do they in any way impair, as applying to the "swamp lands," the force of the argument which we have made as to the lands granted by the United States for railroad purposes, to the effect that they are non-taxable in the hands of the State, and that the privilege of immunity from taxation may rightfully be transferred by the State to the beneficiaries to whom the lands are granted by the State.

IV.

We do not, of course, controvert the proposition so frequently reiterated in the brief of counsel for defendant in error to the effect that the presumption is against any grant of immunity from or exemption from taxation, either in whole or in part. We recognize fully the authorities cited to that effect—such, for instance, as *New Orleans City, etc., Company vs. New Orleans*, 143 U. S., 192, cited by counsel for defendant in error at page 59 of their brief.

In the case just referred to there was an absence of any language providing that the tax imposed by the city ordinance and agreed to be paid by the railroad company should be *in lieu* of all other taxes. Hence the Court held that the railroad company remained subject to the imposition of such additional taxes as the City or State might thereafter impose.

In the case at bar, on the other hand, it is expressly provided that the payment by the Lake Superior and Mississippi Railroad Company (to whose rights the St. Paul and Duluth Railroad Company is admitted to have succeeded) of three per cent. of the gross earnings of the railroad annually "shall be and is *in full* of *all* taxation and assessment *whatever*." In view of this language it is idle to discuss the question of presumption. There is no room for presumption one way or the other. The intent of this act is beyond all question. The only room for controversy is as to its validity under the Constitution of Minnesota. No other question properly arises before this Court in this case, and for the reasons so fully set forth in the briefs heretofore filed on behalf of plaintiff in error, we submit that the constitutionality of the legislation on the faith of which this railroad was built, cannot now be successfully attacked.

V.

Counsel for defendant in error incorrectly state the purport of the case of *First Division Co. vs. Parcher*, 14 Minn., 297. Counsel state (at p. 17): "We there find the Court *studiously placing its decision* upon the fact that the rights of the company antedated the Constitution."

So far is this from being the fact that the Court appears to have entertained no doubt of the power of the State Legislature to grant lands to a railroad free from taxation in consideration of an annual tax on earnings. The question was discussed whether the Territorial government, being "a mere creature of Congress, created for temporary purposes only," possessed such a power.

The Court say that the general legislative power conferred by the Organic Act of the Territory was "ample to sustain the grant of exemption from taxation in this case, and we can perceive no reason why such grant may not be a subject of legislation as *rightful* under a Territorial *as under a State government*" (pp. 326, 327).

It is not even hinted at by the Court that the Constitution of the State had restricted the power of the State Legislature to make such a grant. The contrary is assumed by the Court. This assumption is especially significant, as this decision was made in 1869, a little over 10 years after the adoption of the State Constitution, and by Judges who were contemporary with the convention which framed the Constitution.

The policy of the *State* at that time with regard to the encouragement of railroad construction is clearly set forth at pages 330 and 331 (quoted in our main brief and in the brief on behalf of the Northern Pacific Railway Co.).

It was not until after this policy had been crowned with success and the State had become honeycombed by railroads built on the faith of land grants, whose

construction and operation had transformed a wilderness into a great, thriving and prosperous community that the Courts of Minnesota began to suspect the constitutionality of the grants by the State. Certainly the Judges who decided the Pareler case had no such suspicion, or if they had they carefully concealed their suspicion.

VI.

The validity of commuted taxation of railroad companies by a charge of a percentage of gross earnings in lieu of a specific tax upon their property or franchises is practically conceded by counsel for defendant in error.

He is obliged to concede this, for the very statute of 1895 which he undertakes to defend, while providing for taxation of the lands granted to railroads, at the same time provides "that said railroad companies shall *continue to pay taxes into the State treasury upon their gross earnings in the same manner and in the same amount as is now provided by law*, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands."

The validity of the gross earnings tax is supported on the theory of ratification by the Constitutional Amendment of 1871, as interpreted by the Supreme Court of Minnesota in the *Luther* case.

The Supreme Court of Minnesota and counsel for defendant in error, however, in the case at bar, while recognizing this ruling in the *Luther* case, take the position that the ratification is subject to the right to repeal with the consent of the voters of the State.

We have discussed this proposition fully in our main brief and shall not repeat here our argument on this branch of the case.

We desire, however, to call the attention of the Court to the circumstance that the Act of 1895 *is not such an act as is contemplated by the amendments of 1871.*

The Act of 1895 does not undertake to repeal or amend the provisions of the statutes taxing gross earnings of railroads. On the contrary, it expressly provides that they shall continue in force, except so far as concerns the tax on lands not used or occupied in the actual management and operation of the railroads.

In other words the Act of 1895 retains all the benefits to the State of the system of commuted taxation while repudiating the obligations of the grants.

We submit that the intent of the constitutional amendment was to put the State to its election either to continue or to discontinue the system of taxing upon gross earnings " in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property." We submit that the State cannot continue the system and at the same time abolish the exemptions in consideration of which this commuted system of taxation was accepted by the railroads, and in view of which the system was ratified by the constitutional amendment.

The State must either tax *all* of the property of the railroads according to its value and abandon the system of taxing by a fixed percentage of gross earnings, or else it must preserve the system " in lieu of all other taxes."

Any other construction of the Constitutional Amendment would be most unjust and would subject railroads to double and discriminating taxation of the most unfair description.

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